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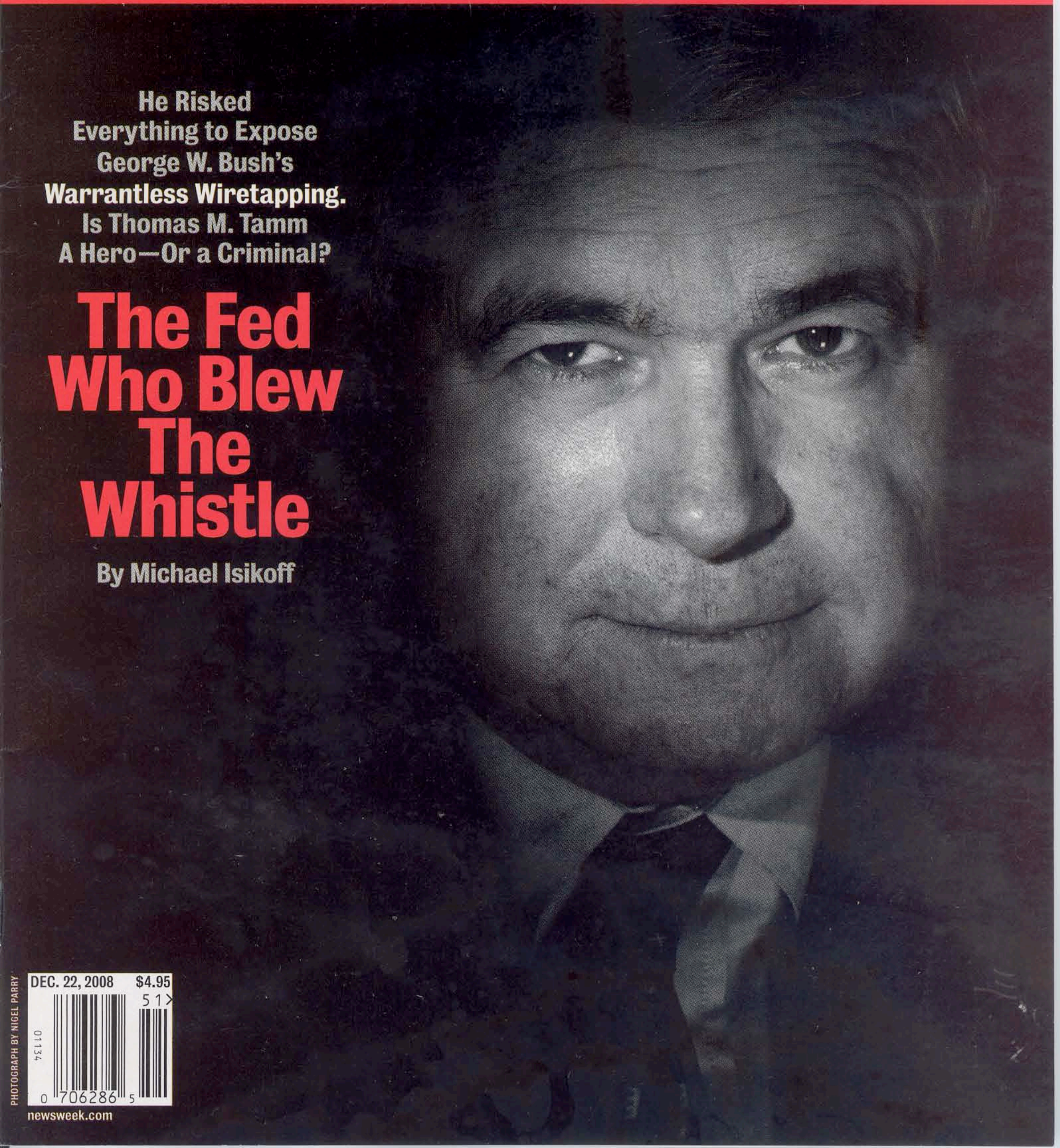

He Risked Everything to Expose George W. Bush's **Warrantless Wiretapping.** Is Thomas M. Tamm A Hero—Or a Criminal?

The Fed Who Blew The Whistle

By Michael Isikoff

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PHOTOGRAPH BY NIGEL PARRY

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Newsweek
Cover Story: Justice

By MICHAEL ISIKOFF

Thomas M. Tamm was entrusted with some of the government's most important secrets. He had a Sensitive Compartmented Infor-

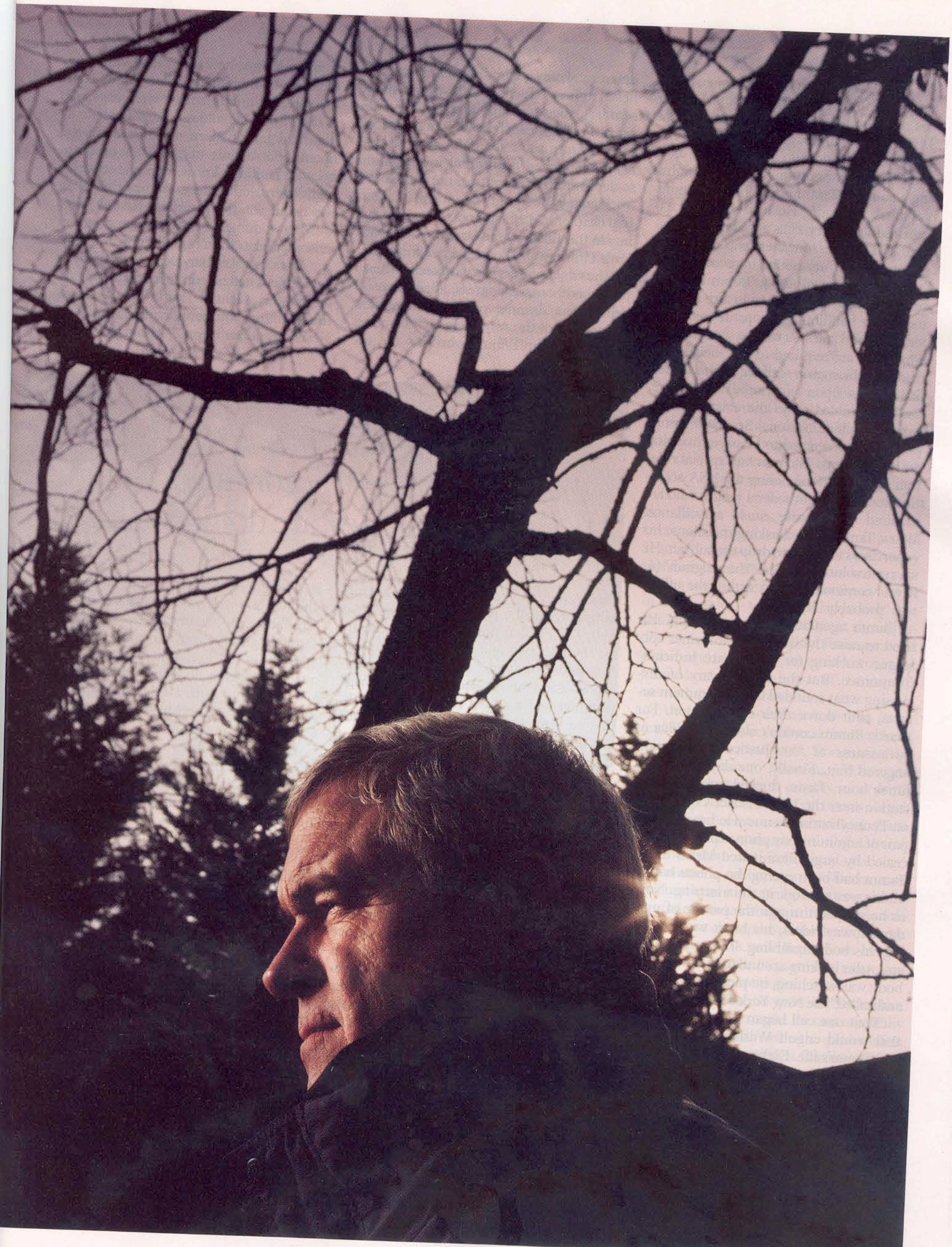
The Fed Who Blew the Whistle

mation security clearance, a level above Top Secret. Government agents had probed Tamm's background, his friends and associates, and determined him trustworthy.

'PASSION FOR JUSTICE'

Now gray-haired, 56 and fighting a paunch, Tamm prides himself on his personal rectitude

PHOTOGRAPH BY NIGEL PARRY FOR NEWSWEEK



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It's easy to see why: he comes from a family of high-ranking FBI officials. During his childhood, he played under the desk of J. Edgar Hoover, and as an adult, he enjoyed a long and successful career as a prosecutor. Now gray-haired, 56 and fighting a paunch, Tamm prides himself on his personal rectitude. He has what his 23-year-old son, Terry, calls a "passion for justice." For that reason, there was one secret he says he felt duty-bound to reveal.

In the spring of 2004, Tamm had just finished a yearlong stint at a Justice Department unit handling wiretaps of suspected terrorists and spies—a unit so sensitive that employees are required to put their hands through a biometric scanner to check their fingerprints upon entering. While there, Tamm stumbled upon the existence of a highly classified National Security Agency program that seemed to be eavesdropping on U.S. citizens. The unit had special rules that appeared to be hiding the NSA activities from a panel of federal judges who are required to approve such surveillance. When Tamm started asking questions, his supervisors told him to drop the subject. He says one volunteered that "the program" (as it was commonly called within the office) was "probably illegal."

Tamm agonized over what to do. He tried to raise the issue with a former colleague working for the Senate Judiciary Committee. But the friend, wary of discussing what sounded like government secrets, shut down their conversation. For weeks, Tamm couldn't sleep. The idea of lawlessness at the Justice Department angered him. Finally, one day during his lunch hour, Tamm ducked into a subway station near the U.S. District Courthouse on Pennsylvania Avenue. He headed for a pair of adjoining pay phones partially concealed by large, illuminated Metro maps. Tamm had been eyeing the phone booths on his way to work in the morning. Now, as he slipped through the parade of midday subway riders, his heart was pounding, his body trembling. Tamm felt like a spy. After looking around to make sure nobody was watching, he picked up a phone and called The New York Times.

That one call began a series of events that would engulf Washington—and upend Tamm's life. Eighteen months after he first disclosed what he knew, the Times reported that President George W. Bush had secretly authorized the NSA to intercept phone calls and e-mails of individuals inside the United States without judicial warrants. The drama followed a quiet, separate rebellion within the highest ranks of the Justice Department concerning the same program. (James Comey, then the deputy attorney general, together with FBI head Robert Mueller and several other senior Justice officials, threatened to resign.) President Bush condemned the leak to the Times as a "shameful act." Federal agents launched a criminal investigation to determine the identity of the culprit.

> Tamm asked a superior if she knew what the program was. 'Don't even go there,' she replied, according to Tamm. 'I assume what they are doing is illegal.'

The story of Tamm's phone call is an untold chapter in the history of the secret wars inside the Bush administration. The New York Times won a Pulitzer Prize for its story. The two reporters who worked on it each published books. Congress, after extensive debate, last summer passed a major new law to govern the way such surveillance is conducted. But Tamm—who was not the Times's only source, but played the key role in tipping off the paper—has not fared so well. The FBI has pursued him relentlessly for the past two and a half years. Agents have raided his house, hauled away personal possessions and grilled his wife, a teenage daughter and a grown son. More recently, they've been questioning Tamm's friends and associates about nearly every aspect of his life. Tamm has resisted pressure to plead to a felony for divulging classified information. But he is living under a pall, never sure if or when federal agents might arrest him.

Exhausted by the uncertainty clouding his life, Tamm now is telling his story publicly for the first time. "I thought this [secret program] was something the other branches of the government—and the public—ought to know about. So they could decide: do they want this massive spying program to be taking place?" Tamm told NEWSWEEK, in one of a series of recent interviews that he granted against the advice of his lawyers. "If somebody were to say, who am I to do that? I would say, 'I had taken an oath to uphold the Constitution.' It's stunning that somebody higher up the chain of command didn't speak up."

Tamm concedes he was also motivated in part by his anger at other Bush-administration policies at the Justice Department, including its aggressive pursuit of death-penalty cases and the legal justifications for "enhanced" interrogation techniques that many believe are tantamount to torture. But, he insists, he divulged no "sources and methods" that might compromise national security when he spoke to the Times. He told reporters Eric Lichtblau and James Risen nothing about the operational details of the NSA program because he didn't know them, he says. He had never been "read into," or briefed, on the details of the program. All he knew was that a domestic surveillance program existed, and it "didn't smell right."

(Justice spokesman Dean Boyd said the department had no comment on any aspect of this story. Lichtblau said, "I don't discuss the identities of confidential sources ... Nearly a dozen people whom we interviewed agreed to speak with us on the condition of anonymity because of serious concerns about the legality and oversight of the secret program." Risen had no comment.)

Still, Tamm is haunted by the consequences of what he did—and what could yet happen to him. He is no longer employed at Justice and has been struggling to make a living practicing law. He does occasional work for a local public defender's office, handles a few wills and estates—and is more than $30,000 in debt. (To cover legal costs, he recently set up a defense fund.) He says he has suffered from depression. He also realizes he made what he calls "stupid" mistakes along the way, including sending out a seemingly innocuous but fateful e-mail from his Justice Department computer that may have first put the FBI on his scent. Soft-spoken and self-effacing, Tamm has an impish smile and a wry sense of humor. "I guess I'm not a very good criminal," he jokes.

At times during his interviews with NEWSWEEK, Tamm would stare into space for minutes, silently wrestling with how to answer questions. One of the most difficult concerned the personal ramifications of his choice. "I didn't think through what this could do to my family," he says.

Tamm's story is in part a cautionary tale about the perils that can face all whistleblowers, especially those involved in national-security programs. Some Americans will view him as a hero who (like

Daniel Ellsberg and perhaps Mark Felt, the FBI official since identified as Deep Throat) risked his career and livelihood to expose wrongdoing at the highest levels of government. Others—including some of his former colleagues—will deride Tamm as a renegade who took the law into his own hands and violated solemn obligations to protect the nation's secrets. "You can't have runoffs deciding they're going to be the white knight and running to the press," says Frances Fragos Townsend, who once headed the unit where Tamm worked and later served as President Bush's chief counterterrorism adviser. Townsend made clear that she had no knowledge of Tamm's particular case, but added: "There are legal processes in place [for whistle-blowers' complaints]. This is one where I'm a hawk. It offends me, and I find it incredibly dangerous."

Tamm understands that some will see his conduct as "treasonous." But still, he says he has few regrets. If he hadn't made his phone call to the Times, he believes, it's possible the public would never have learned about the Bush administration's secret wiretapping program. "I don't really need anybody to feel sorry for me," he wrote in a recent e-mail to NEWSWEEK. "I chose what I did. I believed in what I did."

If the government were drawing up a profile of a national-security leaker, Tamm would seem one of the least likely suspects. He grew up in the shadow of J. Edgar Hoover's FBI. Tamm's uncle, Edward Tamm, was an important figure in the bureau's history. He was once a top aide to Hoover and regularly briefed President Franklin Roosevelt on domestic intelligence matters. He's credited in some bureau histories with inventing (in 1935) not only the bureau's name, but its official motto: Fidelity, Bravery, Integrity. Tamm's father, Quinn Tamm, was also a high-ranking bureau official. He too was an assistant FBI director under Hoover, and at one time he headed up the bureau's crime lab. Tamm's mother, Ora Belle Tamm, was a secretary at the FBI's identification division.

When Thomas Tamm was a toddler, he crawled around Hoover's desk during FBI ceremonies. (He still remembers his mother fretting that his father might get in trouble for it.) As an 8-year-old, Tamm and his family watched John F. Kennedy's Inaugural parade down Pennsylvania Avenue from the balcony of Hoover's office, then located at the Justice Department.

Tamm's brother also served for years as an FBI agent and later worked as an investigator for the 9/11 Commission. (He now works for a private consulting firm.) Tamm himself, after graduating from Brown University in 1974 and Georgetown Law three years later, chose a different path in law enforcement. He joined the state's attorney's office in Montgomery County, Md. (He was also, for a while, the chairman of the county chapter of the Young Republicans.) Tamm eventually became a senior trial attorney responsible for prosecuting murder, kidnapping and sexual-assault cases. Andrew Sonner, the Democratic state's attorney at the time, says that Tamm was an unusually gifted prosecutor who knew how to connect with juries, in part by "telling tales" that explained his case in a way that ordinary people could understand. "He was about as good before a jury as anybody that ever worked for me," says Sonner, who later served as an appellate judge in Maryland.

In 1998, Tamm landed a job at the Justice Department's Capital Case Unit, a new outfit within the criminal division that handled prosecutions that could bring the federal death penalty. A big part of his job was to review cases forwarded by local U.S. Attorneys' Offices and make recommendations about whether the government should seek execution. Tamm would regularly attend meetings with Attorney General Janet Reno, who was known for asking tough questions about the evidence in such cases—a rigorous approach that Tamm admired. In July 2000, at a gala Justice Department ceremony, Reno awarded Tamm and seven colleagues in his unit the John Marshall Award, one of the department's highest honors.

After John Ashcroft took over as President Bush's attorney general the next year, Tamm became disaffected. The Justice Department began to encourage U.S. attorneys to seek the death penalty in as many cases as possible. Instead of Reno's skepticism about recommendations to seek death, the capital-case committee under Ashcroft approved them with little, if any, challenge. "It became a rubber stamp," Tamm says. This bothered him, though there was nothing underhanded about it. Bush had campaigned as a champion of the death penalty. Ashcroft and the new Republican leadership of the Justice Department advocated its use as a matter of policy.

Tamm's alienation grew in 2002 when he was assigned to assist on one especially high-profile capital case—the prosecution of Zacarias Moussaoui, a Qaeda terrorist arrested in Minnesota who officials initially (and wrongly) believed might have been the "20th hijacker" in the September 11 plot. Tamm's role was to review classified CIA cables about the 9/11 plot to see if there was any exculpatory information that needed to be relinquished to Moussaoui's lawyers. While reviewing the cables, Tamm says, he first spotted reports that re-

'OH, MY GOD'

Tamm, having called the Times, thought back to his days at the capital-case squad. Could disclosing information about a classified program earn him the death penalty?

PHOTOGRAPH BY CHARLES OMMANNEY—GETTY IMAGES FOR NEWSWEEK ferred to the rendition of terror suspects to countries like Egypt and Morocco, where aggressive interrogation practices banned by American law were used. It appeared to Tamm that CIA officers knew "what was going to happen to [the suspects]"—that the government was indirectly participating in abusive interrogations that would be banned under U.S. law.

But still, Tamm says he was fully committed to the prosecution of the war on terror and wanted to play a bigger role in it. So in early 2003, he applied and was accepted for transfer to the Office of Intelligence Policy and Review (OIPR), probably the most sensitive unit within the Justice Department. It is the job of OIPR lawyers to request permission for national-security wiretaps. These requests are made at secret hearings of the Foreign Intelligence Surveillance Court, a body composed of 11 rotating federal judges.

Congress created the FISA court in 1978 because of well-publicized abuses by the intelligence community. It was designed to protect the civil liberties of Americans who might come under suspicion. The court's role was to review domestic national-security wiretaps to make sure there was "probable cause" that the targets were "agents of a foreign power"—either spies or operatives of a foreign terrorist organization. The law creating the court, called the Foreign Intelligence Surveillance Act, made it a federal crime—punishable by up to five years in prison—for any official to engage in such surveillance without following strict rules, including court approval.

But after arriving at OIPR, Tamm learned about an unusual arrangement by which some wiretap requests were handled under special procedures. These requests, which could be signed only by the attorney general, went directly to the chief judge and none other. It was unclear to Tamm what was being hidden from the other 10 judges on the court (as well as the deputy attorney general, who could sign all other FISA warrants). All that Tamm knew was that the "A.G.-only" wiretap requests involved intelligence gleaned from something that was obliquely referred to within OIPR as "the program."

The program was in fact a wide range of covert surveillance activities authorized by President Bush in the aftermath of 9/11. At that time, White House officials, led by Vice President Dick Cheney, had become convinced that FISA court procedures were too cumbersome and time-consuming to permit U.S. intelligence and law-enforcement agencies to quickly identify possible Qaeda terrorists inside the country. (Cheney's chief counsel, David Addington, referred to the FISA court in one meeting as that "obnoxious court," according to former assistant attorney general Jack Goldsmith.) Under a series of secret orders, Bush authorized the NSA for the first time to eavesdrop on phone calls and e-mails between the United States and a foreign country without any court review. The code name for the NSA collection activities—unknown to all but a tiny number of officials at the White House and in the U.S. intelligence community—was "Stellar Wind."

The NSA identified domestic targets based on leads that were often derived from the seizure of Qaeda computers and cell phones overseas. If, for example, a Qaeda cell phone seized in Pakistan had dialed a phone number in the United States, the NSA would target the U.S. phone number—which would then lead agents to look at other numbers in the United States and abroad called by the targeted phone. Other parts of the program were far more sweeping. The NSA, with the secret cooperation of U.S. telecommunications companies, had begun collecting vast amounts of information about the phone and e-mail records of American citizens. Separately, the NSA was also able to access, for the first time, massive volumes of personal financial records—such as credit-card transactions, wire transfers and bank withdrawals—that were being reported to the Treasury Department by financial institutions. These included millions of "suspicious-activity reports," or SARS, according to two former Treasury officials who declined to be identified talking about sensitive programs. (It was one such report that tipped FBI agents to former New York governor Eliot Spitzer's use of prostitutes.) These records were fed into NSA supercomputers for the purpose of "data mining"—looking for links or patterns that might (or might not) suggest terrorist activity.

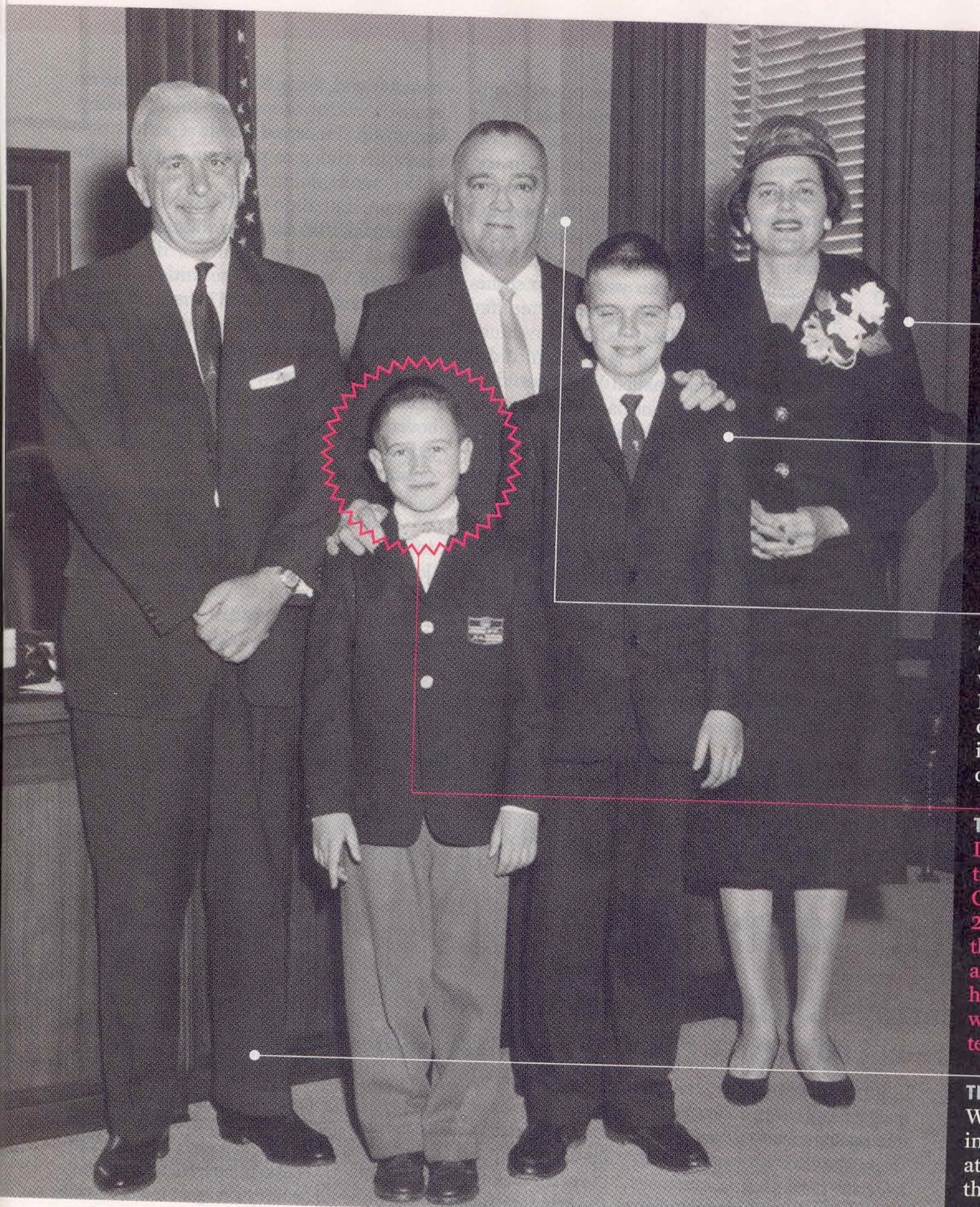
But all this created a huge legal quandary. Intelligence gathered by the extralegal phone eavesdropping could never be used in a criminal court. So after the NSA would identify potential targets inside the United States, counterterrorism officials would in some instances try to figure out ways to use that information to get legitimate FISA warrants—giving the cases a judicial stamp of approval.

It's unclear to what extent Tamm's office was aware of the origins of some of the information it was getting. But Tamm was puzzled by the unusual procedures—which sidestepped the normal FISA process—for requesting wiretaps on cases that involved program intelligence. He began pushing his supervisors to explain what was going on. Tamm says he found the whole thing especially curious since there was nothing in the special "program" wiretap requests that seemed any different from all the others. They looked and read the same. It seemed to Tamm there was a reason for this: the intelligence that came from the program was being disguised. He didn't understand why. But whenever Tamm would ask questions about this within OIPR, "nobody wanted to talk about it."

At one point, Tamm says, he approached Lisa Farabee, a senior counsel in OIPR who reviewed his work, and asked her directly, "Do you know what the program is?" According to Tamm, she replied: "Don't even go there," and then added, "I assume what they are doing is illegal." Tamm says his immediate thought was, "I'm a law-enforcement officer and I'm participating in something that is illegal?" A few weeks later Tamm bumped into Mark Bradley, the deputy OIPR counsel, who told him the office had run into trouble with Colleen Kollar-Kotelly, the chief judge on the FISA court. Bradley seemed nervous, Tamm says. Kollar-Kotelly had raised objections to the special program wiretaps, and "the A.G.-only cases are being shut down," Bradley told Tamm. He then added, "This may be [a time] the attorney general gets indicted," according to Tamm. (Told of Tamm's account, Justice spokesman Boyd said that Farabee and Bradley "have no comment for your story.")

One official who was aware of Kollar-Kotelly's objections was U.S. Judge Royce C. Lamberth, a former chief of the FISA court. Lamberth tells NEWSWEEK that when the NSA program began in October 2001, he was not informed. But the then

FBI agents arrived unexpectedly at Tamm's house. His wife, in pajamas, watched them seize computers, private papers, books, a Christmas list.



FBI Family Portrait

Tamm has deep roots in the bureau; his uncle has been credited with naming it and devising the motto "Fidelity, Bravery, Integrity." The rest of the family:

THE MOTHER: ORA BELLE
Worked as a secretary in the FBI's identification division

THE BROTHER: QUINN JR.
Served for years as an FBI agent and later went to work as an investigator for the 9/11 Commission

J. EDGAR HOOVER
Tamm's uncle and father were top aides to the FBI director; as a toddler, Tamm recalls playing under Hoover's desk during FBI ceremonies

THOMAS TAMM
Landed a job in the Justice Department's Capital Case Unit in 1998. In 2003 he transferred to the Office of Intelligence and Policy Review, which handles national-security wiretaps of spies and terrorists.

THE FATHER: QUINN
Was an assistant director in Hoover's FBI and, at one time, headed the bureau's crime lab

chief of OIPR, James Baker, discovered later that year that program intelligence was being used in FISA warrants—and he raised concerns. At that point, Lamberth was called in for a briefing by Ashcroft and Gen. Michael Hayden, the NSA chief at the time. Lamberth made clear to Ashcroft that NSA program intelligence should no longer be allowed in any FISA warrant applications without his knowledge. If it did appear, Lamberth warned, he would be forced to rule on the legality of what the administration was doing, potentially setting off a constitutional clash about the secret program.

Lamberth stepped down as chief FISA judge when his term ended in May 2002, but Kollar-Kotelly asked him to continue as an adviser about matters relating to the program. In early 2004, Kollar-Kotelly thought something was amiss. According to Lamberth, she had concerns that the intelligence community, after collecting information on U.S. citizens without warrants, was again attempting to launder that intelligence through her court—without her knowledge. She "had begun to suspect that they were back-dooring information from the program into" FISA applications, Lamberth tells NEWSWEEK. Kollar-Kotelly drew the line and wouldn't permit it. "She was as tough as I was," says Lamberth, who had once barred a top FBI agent from his court when he concluded the bureau hadn't been honest about FISA applications. "She was going to know what she was signing off on before she signed off ... I was proud of her." (Kollar-Kotelly declined to speak with NEWSWEEK.)

Unbeknownst to Tamm, something else was going on at the Justice Department during this period. A new assistant attorney general, a law professor named Jack Goldsmith, had challenged secret legal opinions justifying the NSA surveillance program. (The controversial opinions, written by a young and very conservative legal scholar named John Yoo, had concluded that President Bush had broad executive authority during wartime to override laws passed by Congress and order the surveillance of U.S. citizens.) James Comey, the deputy attorney general, had agreed with Goldsmith and refused to sign off on a renewal of the domestic NSA program in March 2004. Attorney General Ashcroft was in the hospital at the time. The White House first tried to get an extremely ill Ashcroft, drugged and woozy, to overrule Comey, and then, after he refused, President Bush ordered the program to continue anyway. Comey, in turn, drafted a resignation letter. He described the situation he was confronting as "apocalyptic" and then added, "I and the Justice Department have been asked to be part of something that is fundamentally wrong," according to a copy of the letter quoted in "Angler," a book by Washington Post reporter Barton Gellman.

Tamm—who had no knowledge of the separate rebellion within the ranks of the Justice Department—decided independently to get in touch with Sandra Wilkinson, a former colleague of his on the Capital Case Unit who had been detailed to work on the Senate Judiciary Committee. He met with Wilkinson for coffee in the Senate cafeteria, where he laid out his concerns about the program and the unusual procedures within OIPR. "Look, the government is doing something weird here," he recalls saying. "Can you talk to somebody on the intelligence committee and see if they know about this?"

Some weeks passed, and Tamm didn't hear back. So he e-mailed Wilkinson from his OIPR computer (not a smart move, he would later concede) and asked if they could get together again for coffee. This time, when they got together, Wilkinson was cool, Tamm says. What had she learned about the program? "I can't say," she replied and urged him to drop the subject. "Well, you know, then," he says he replied, "I think my only option is to go to the press." (Wilkinson would not respond to phone calls from NEWSWEEK, and her lawyer says she has nothing to say about the matter.)

The next few weeks were excruciating. Tamm says he consulted with an old law-school friend, Gene Karpinski, then the executive director of a public-interest lobbying group. He asked about reporters who might be willing to pursue a story that involved wrongdoing in a national-security program, but didn't tell him any details. (Karpinski, who has been questioned by the FBI and has hired a lawyer, declined to comment.) Tamm says he initially considered contacting Seymour Hersh, the investigative reporter for The New Yorker, but didn't know where to reach him. He'd also noticed some strong stories by Eric Lichtblau, the New York Times reporter who covered the Justice Department—and with a few Google searches tracked down his phone number.

Tamm at this point had transferred out of OIPR at his own initiative, and moved into a new job at the U.S. Attorney's Office. He says he "hated" the desk work at OIPR and was eager to get back into the courtroom prosecuting cases. His new offices were just above Washington's Judiciary Square Metro stop. When he went to make the call to the Times, Tamm said, "My whole body was shaking." Tamm de-

EXCLUSIVE

Now We Know What The Battle Was About

Justice Department lawyers defied President Bush over secret surveillance—but not for the reasons you might think.

By DANIEL KLAIDMAN

It is one of the darkly iconic scenes of the Bush administration. In March 2004, two of the president's most senior advisers rushed to a Washington hospital room where they confronted a bedridden John Ashcroft. White House chief of staff Andy Card and counsel Alberto Gonzales pressured the attorney general to renew a massive domestic-spying program that would lapse in a matter of days. But others hurried to the hospital room, too. Ashcroft's deputy, James Comey, later joined by FBI Director Robert Mueller, stood over Ashcroft's bed to make sure the White House aides didn't coax their drugged and bleary colleague into signing something unwittingly. The attorney general, sick and pain-racked from a rare pancreatic disease, rose up from his bed, gathering what little strength he had, and firmly told the president's emissaries that he would not sign their papers.

White House hard-liners would make one more effort—getting the president to recertify the program on his own, relying on his powers as commander in chief. But in the end, with an election looming and the entire political leadership of the Justice Department poised to resign rather than carry out orders they thought to be illegal, Bush backed down. The rebels prevailed.

But that is only part of the story—because Bush, even though he made concessions to the rebels, kept other aspects of the program intact. Even after The New York Times revealed the existence of the secret surveillance two years later—and despite outrage in Congress and among civil libertarians—monitoring of calls and e-mails between the United States and overseas without court approval continues. Much has been written about the Justice Department rebellion, including, most recently, the account in Barton Gellman's groundbreaking book "Angler." But a mystery remains: What did the Justice Department rebels object to, and what concessions did Bush make to appease them? What, precisely, was canceled?

Two knowledgeable sources tell NEWSWEEK that the clash erupted over a part of Bush's espionage program that had nothing to do with the wiretapping of *individual* suspects. Rather, Comey and others threatened to resign because of the vast and indiscriminate collection of communications data. These sources, who asked not to be named discussing intelligence matters, describe a system in which the National Security Agency, with cooperation from some of the country's largest telecommunications companies, was able to vacuum up the records of calls and e-mails of tens of millions of average Americans between September 2001 and March 2004. The program's classified code name was "Stellar Wind," though when officials needed to refer to it on the phone, they called it "SW." (The NSA says it has "no information or comment"; a Justice Department spokesman also declined to comment.)

The NSA's powerful computers became vast storehouses of "metadata." They collected the telephone numbers of callers and scribed himself to Lichtblau as a "former" Justice employee and called himself "Mark," his middle name. He said he had some information that was best discussed in person. He and Lichtblau arranged to meet for coffee at Olsson's, a now shuttered bookstore near the Justice Department. After Tamm hung up the phone, he was struck by the consequences of what he had just done. "Oh, my God," he thought. "I can't talk to anybody about this." An even more terrifying question ran through his mind. He thought back to his days at the capital-case squad and wondered if disclosing information about a classified program could earn him the death penalty.

In his book, "Bush's Law: The Remaking of American Justice," Lichtblau writes that he first got a whiff of the NSA surveillance program during the spring of 2004 when he got a cold call from a "walk-in" source who was "agitated about something going on in the intelligence community." Lichtblau wrote that his source was wary at first. The source did not know precisely what was going on—he was, in fact, maddeningly vague, the reporter wrote. But after they got together for a few meetings ("usually at a bookstore or coffee shops in the shadows of Washington's power corridors") his source's "credibility and his bona fides became clear and his angst appeared sincere." The source told him of turmoil within the Justice Department concerning counterterrorism operations and the FISA court. "Whatever is going on, there's even talk Ashcroft could be indicted," the source told Lichtblau, according to his book.

Tamm grew frustrated when the story did not immediately appear. He was hoping, he says, that Lichtblau and his partner Risen (with whom he also met) would figure out on their own what the program was really all about and break it before the 2004 election. He was, by this time, "pissed off" at the Bush administration, he says. He contributed $300 to the Democratic National Committee in September 2004, according to campaign finance records.

It wasn't until more than a year later that the paper's executive editor, Bill Keller, rejecting a personal appeal and warning by President Bush, gave the story a green light. (Bush had warned "there'll be blood on your hands" if another attack were to occur.) BUSH LETS U.S. SPY ON CALLERS WITHOUT COURTS, read the headline in the paper's Dec. 16, 2005, edition. The story—which the Times said relied on "nearly a dozen current and former officials"—had immediate repercussions. Democrats, including the then Sen. Barack Obama, denounced the Bush administration for violating the FISA law and demanded hearings. James Robertson, one of the judges on the FISA court, resigned. And on Dec. 30, the Justice Department announced that it was launching a criminal investigation to determine who had leaked to the Times.

Not long afterward, Tamm says, he started getting phone calls at his office from Jason Lawless, the hard-charging FBI agent in charge of the case. The calls at first seemed routine. Lawless was simply calling everybody who had worked at

'METADATA' MACHINES

Using complex algorithms, NSA computers sifted through a storehouse of information to detect phone-call patterns

recipients in the United States, and the time and duration of the calls. They also collected and stored the subject lines of e-mails, the times they were sent, and the addresses of both senders and recipients. By one estimate, the amount of data the NSA could suck up in close to real time was equivalent to one quarter of the entire Encyclopaedia Britannica per second. (The actual content of calls and e-mails was not being monitored as part of this aspect of the program, the sources say.) All this metadata was then sifted by the NSA, using complex algorithms to detect patterns and links that might indicate terrorist activity.

The secret collection and data-mining program had begun with a blessing by John Yoo, an ultraconservative lawyer in the Justice Department's Office of Legal Counsel. Yoo was a close ally of hard-line lawyers in the White House and worked closely with David Addington, Vice President Dick Cheney's lawyer. (Addington is now Cheney's chief of staff.) But by 2003, Yoo had moved on, and a new head of the OLC, Jack Goldsmith, began reviewing his work. Goldsmith found Yoo's legal opinions justifying the program flawed. His reasons are based on a mind-numbingly complex area of federal law, but the basic analysis comes down to this: the systematic collection and digital transmission of huge amounts of telephone and e-mail data by the government constitutes "electronic surveillance" under the Foreign Intelligence Surveillance Act, the exclusive law governing domestic spying in national-security cases. For such activities, FISA requires a court-approved warrant. Therefore, the program was illegal. The White House lawyers countered that the president's constitutional powers as commander in chief trumped FISA. Goldsmith and his colleagues rejected that argument, and won. Days after the hospital clash, Bush shut down the massive data-collection program and stopped searches of the data that had already been stored. (It's unclear whether the administration has since found new legal justification to return to at least some of these activities.)

This updated version of events helps explain exactly what motivated stalwart Republican lawyers like Comey to defy their Republican president. The Justice lawyers were not fuming about an Orwellian invasion of the privacy of American citizens. Though all the rebellious lawyers agreed that the program was illegal, some favored its goals while others questioned its efficacy. "At the end of the day, the dispute was a legal one, not a policy one," says one participant. "It was about upholding the rule of law, not about what was appropriate from a civil-libertarian standpoint or any other standpoint."

One of the most consequential government rebellions in memory may be regarded as an act of heroism by civil libertarians. But the rebels were conservatives who might have been willing to—and in some cases did—approve policies that would not sit well with many Americans. They just weren't willing to break the law. Which is how the president's men ended up in John Ashcroft's hospital room on a cool March evening.

PHOTOGRAPH BY KHUE BUI FOR NEWSWEEK

OIPR to find out what they knew. But Tamm ducked the calls; he knew that the surest way to get in trouble in such situations was to lie to an FBI agent. Still, he grew increasingly nervous. The calls continued. Finally, one day, Lawless got him on the phone. "This will just take a few minutes," Lawless said, according to Tamm's account. But Tamm told the agent that he didn't want to be interviewed—and he later hired a lawyer. (The FBI said that Lawless would have no comment.)

In the months that followed, Tamm learned he was in even more trouble. He suspected the FBI had accessed his former computer at OIPR and recovered the e-mail he had sent to Wilkinson. The agents tracked her down and questioned her about her conversations with Tamm. By this time, Tamm was in the depths of depression. He says he had trouble concentrating on his work at the U.S. Attorney's Office and ignored some e-mails from one of his supervisors. He was accused of botching a drug case. By mutual agreement, he resigned in late 2006. He was out of a job and squarely in the sights of the FBI. Nevertheless, he began blogging about the Justice Department for liberal Web sites.

Early on the morning of Aug. 1, 2007, 18 FBI agents—some of them wearing black flak jackets and carrying guns—showed up unannounced at Tamm's red-brick colonial home in Potomac, Md., with a search warrant. While his wife, wearing her pajamas, watched in horror, the agents marched into the house, seized Tamm's desktop computer, his children's laptops, his private papers, some of his books (including one about Deep Throat) and his family Christmas-card list. Terry Tamm, the lawyer's college-age son, was asleep at the time and awoke to find FBI agents entering his bedroom. He was escorted downstairs, where, he says, the agents arranged him, his younger sister and his mother around the kitchen table and questioned them about their father. (Thomas Tamm had left earlier that morning to drive his younger son to summer school and to see a doctor about a shoulder problem.) "They asked me questions like 'Are there any secret rooms or compartments in the house?'" recalls Terry. "Or did we have a safe? They asked us if any New York Times reporters had been to the house. We had no idea why any of this was happening." Tamm says he had never told his wife and family about what he had done.

After the raid, Justice Department prosecutors encouraged Tamm to plead guilty to a felony for disclosing classified information—an offer he refused. More recently, Agent Lawless, a former prosecutor from Tennessee, has been methodically tracking down Tamm's friends and former colleagues. The agent and a partner have asked questions about Tamm's associates and political meetings he might have attended, apparently looking for clues about his motivations for going to the press, according to three of those interviewed.

In the meantime, Tamm lives in a perpetual state of limbo, uncertain whether

Tamm recognizes that some will 'feel ... I'm a traitor.' Still, he has no regrets: 'I chose what I did. I believed in what I did.'

he's going to be arrested at any moment. He could be charged with violating two laws, one concerning the disclosure of information harmful to "the national defense," the other involving "communications intelligence." Both carry penalties of up to 10 years in prison. "This has been devastating to him," says Jeffrey Taylor, an old law-school friend of Tamm's. "It's just been hanging over his head for such a long time ... Sometimes Tom will just zone out. It's like he goes off in a special place. He's sort of consumed with this because he doesn't know where it's going."

Taylor got a few clues into what the case was about last September when Agent Lawless and a partner visited him. The FBI agents sat in his office for more than an hour, asking what he knew about Tamm. The agents even asked about Tamm's participation in a political lunch group headed by his former boss, Andrew Sonner, that takes place once a month at a Rockville, Md., restaurant. "What does that have to do with anything?" Taylor asked.

Agent Lawless explained. "This kind of activity"—leaking to the news media—"can be motivated by somebody who is a do-gooder who thinks that something wrong occurred," Lawless said, according to Taylor. "Or it could be politically motivated by somebody who wants to cause harm." If it was the former—if Tamm was a "do-gooder"—the government could face a problem if it tried to bring a case to trial. The jurors might sympathize with Tamm and "you'd face jury nullification," said Lawless, according to Taylor, referring to a situation in which a jury refuses to convict a defendant regardless of the law.

Just this month, Lawless and another agent questioned Sonner, the retired judge who had served as a mentor to Tamm. The agents wanted to know if Tamm had ever confided in Sonner about leaking to the Times. Sonner said he hadn't, but he told the agents what he thought of their probe. "I told them I thought operating outside of the FISA law was one of the biggest injustices of the Bush administration," says Sonner. If Tamm helped blow the whistle, "I'd be proud of him for doing that."

Paul Kemp, one of Tamm's lawyers, says he was recently told by the Justice Department prosecutor in charge of Tamm's case that there will be no decision about whether to prosecute until next year—after the Obama administration takes office. The case could present a dilemma for the new leadership at Justice. During the presidential campaign, Obama condemned the warrantless-wiretapping program. So did Eric Holder, Obama's choice to become attorney general. In a tough speech last June, Holder said that Bush had acted "in direct defiance of federal law" by authorizing the NSA program.

Tamm's lawyers say his case should be judged in that light. "When I looked at this, I was convinced that the action he took was based on his view of a higher responsibility," says Asa Hutchinson, the former U.S. attorney in Little Rock and under secretary of the Department of Homeland Security who is assisting in Tamm's defense. "It reflected a lawyer's responsibility to protect the rule of law." Hutchinson also challenged the idea—argued forcefully by other Bush administration officials at the time—that The New York Times story undermined the war on terror by tipping off Qaeda terrorists to surveillance. "Anybody who looks at the overall result of what happened wouldn't conclude there was any harm to the United States," he says. After reviewing all the circumstances, Hutchinson says he hopes the Justice Department would use its "discretion" and drop the investigation. In judging Tamm's actions—his decision to reveal what little he knew about a secret domestic spying program that still isn't completely known—it can be hard to decipher right from wrong. Sometimes the thinnest of lines separates the criminal from the hero. ■